

**REMARKS**

**Allowable Subject Matter**

Applicants wish to thank the Examiner for indicating that claims 4, 6, 9, 10, 15, 17, 20, 21, 24, 26, 28, 30, 33, 34 and 36 are allowable if rewritten in independent form.

**The Section 102 Rejections**

Claims 1-3, 5, 7, 8, 11-14, 16, 18, 19, 22, 23, 25, 27, 29, 31, 32 and 35 were rejected under 35 U.S.C. §102(b) based on Brody et al. U.S. Patent No. 4,670,899 (“Brody”). Applicants respectfully disagree and traverse this rejection for at least the following reasons.

Each of the claims of the present invention includes, among other things, calculating “balancing metric” values for first and second layers based on operating characteristics and adjusting a transmission characteristic based on the respective values of the first and second layers. In contrast, Brody does not disclose or suggest the calculation of such values for layers nor does Brody disclose or suggest the adjustment of a transmission characteristic.

Instead, Brody appears to disclose the determination and adjustment of a channel occupancy level for cells within the same, and different, geographical areas.

There is no disclosure or suggestion in Brody that the cells are layers themselves or that the cells are separated into layers. In addition, the channel occupancy level calculated and apparently adjusted in Brody is not a transmission characteristic nor is it related to a user; it appears to be an operating characteristic related to a cell. Thus, nowhere in Brody is it disclosed or suggested that a transmission characteristic is adjusted.

Because Brody does not disclose each and every element of the claims, Brody cannot anticipate claims 1-3, 5, 7, 8, 11-14, 16, 18, 19, 22, 23, 25, 27, 29, 31, 32 and 35.

Accordingly, Applicants respectfully request withdrawal of the pending rejections and allowance of claims.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact John E. Curtin at the telephone number of the undersigned below.

In the event this Response does not place the present application in condition for allowance, applicant requests the Examiner to contact the undersigned at (703) 668-8000 to schedule a personal interview.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 08-0750 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, extension of time fees.

Respectfully submitted,

HARNESS, DICKIE, & PIERCE, P.L.C.

By

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